INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. ——

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FANSTEEL METALLURGICAL CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit entered on July 22, 1938 (R. 2000), setting aside an order of the National Labor Relations Board against Fansteel Metallurgical Corporation.

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 1947–1971) are reported in 5 N. L. R. B. 930. The opinion of the Circuit Court of Appeals, the concurring opinion, and the dissenting opinion (R. 1980–2000) are reported in 98 F. (2d) 375.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 22, 1938. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether a Circuit Court of Appeals, having determined that the evidence supports the findings of the Board that an employer has engaged in unfair labor practices within the meaning of subsections (1) and (2) of Section 8 of the Act, may nevertheless properly set aside so much of the order of the Board as requires the employer to cease and desist from such unfair labor practices, and to withdraw recognition from the labor organization illegally dominated and supported.

2. Whether there was evidence to support the Board's finding that an announcement made by respondent to certain of its employees purporting to discharge them was not intended to effectuate, and in fact was not, a discharge of these employees.

3. Whether striking employees whose work has ceased because of unfair labor practices and as a consequence of and in connection with a current labor dispute lose their status as employees within the meaning of Section 2 (3) of the Act upon their discharge, assuming that they were in fact discharged.

4. Whether there was evidence to support the findings of the Board that respondent had refused to bargain collectively with the representative of its employees and thereby engaged in an unfair labor practice within the meaning of Section 8 (5) of the Act.

5. Whether the Board has power under Section 10 (c) of the Act, and properly exercised the power in this case, to order an employer to offer reinstatement upon request to any or all of the following groups of employees who have gone on strike because of unfair labor practices committed by the employer:

a. Employees who, during the course of the strike, engaged in a "sit-down" in the employer's premises.

b. Employees who resisted eviction and arrest by state police officers in connection with a state injunction proceeding relating to the strike.

c. Employees who during the course of the strike did not themselves engage in the "sit-down" but brought food and clothing to those who did.

d. Any of the above-described employees who, after the conclusion of the "sit-down", were adjudged in contempt of court in an injunction proceeding in a state court.

6. Whether, if the Board lacked such power or if its exercise was, under the circumstances, an abuse of discretion, the court below properly set aside the order of the Board to the extent that it ordered reinstatement of employees whose only

participation in the strike was their voluntary cessation of work.

7. Whether, in ordering such reinstatement, the Board properly took account of a partial reorganization of operations and positions in respondent's plant made subsequent to the strike in directing that, after such reinstatement, but without disturbing the reorganization made, respondent could reduce or rearrange its staff as then constituted upon any nondiscriminatory basis, subject, however, to dismissing all persons hired for the first time after the strike.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C. Supp. III, Title 29, Sec. 151 *et seq.*) are set forth in the Appendix, *infra*, pp. 32–34.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In holding that the finding of the Board that respondent on February 17, March 3, and March 5, 1937, refused to bargain collectively with the duly designated representative of its employees, thereby engaging in unfair labor practices under Section 8 (5) of the Act, is not supported by evidence.

2. In holding that the finding of the Board that respondent's purported discharge of certain employees on February 17, 1937, was not in fact a discharge is not supported by evidence.

3. In holding that the purported discharge deprived the Board of power to reinstate the strikers.

4. In not holding that all persons who went on strike on February 17, 1937, because of respondent's unfair labor practices, continued at all times thereafter to be employees within the meaning and for the purposes of the Act.

5. In not holding that, despite any acts of violence, the "sit-down," and the violation of the state court injunction, the Board had the power, and under the circumstances of this case properly exercised its discretion, to order respondent to reinstate all employees who went on strike on February 17, 1937, because of respondent's unfair labor practices.

6. In not holding that the Board could properly require respondent, in reinstating the striking employees, to distribute all available positions among such employees and the other employees hired before February 17, 1937, who resumed work, in a nondiscriminatory fashion.

7. In denying enforcement to those portions of the cease and desist provisions of the Board's order which were based upon findings, concededly supported by evidence, of violation of Sections 8 (1) and (2) of the Act.

8. In setting aside the Board's order, and in not granting full enforcement thereof.

STATEMENT

Pursuant to Section 10 (b) of the National Labor Relations Act, the National Labor Relations Board on May 25, 1937, issued a complaint against respondent, a copy of which, together with

notice of hearing, was duly served upon respondent (R. 24–32). The complaint alleged, in substance, that respondent had engaged and was engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1), (2), (3), and (5), and Section 2 (6) and (7) of the Act. (R. 31). Respondent answered on June 2, 1937 (R. 69–79). A hearing was held from June 7 to June 25, 1937, before a Trial Examiner of the Board (R. 95–1561). On September 2, 1937, the Trial Examiner filed an Intermediate Report (R. 1863–1905), containing his findings and recommendations, to which exceptions were filed by respondent and by the Amalgamated Association of Iron, Steel, and Tin Workers of America, Lodge 66 (hereinafter referred to as the Union) (R. 1907–1938, 1941–1944). On March 14, 1938, the Board issued its findings of fact, conclusions of law, and order (R. 1944–1971). The facts as found by the Board and as shown in the evidence may be summarized as follows:[1]

Respondent, a New York corporation, is engaged at North Chicago, Illinois, in the manufacture and sale of various products made from rare metals and is extensively engaged in commerce among the States and with foreign nations (R. 1947). Until early in July 1936 no labor organization of any kind existed at respondent's plant (R. 1947; 165).

[1] In the following statement of the facts the first reference will be to the findings of the Board. Succeeding references, preceded by a semicolon, are to the supporting testimony.

At that time a group of respondent's employees organized a labor organization, the Union (R. 1947–1948; 202, 220–224, 245). Shortly thereafter respondent hired from the National Metal Trades Association, in which it had applied for membership, a labor spy who joined the Union, furnished respondent written reports of union activities, assumed the role of the "radical" in the Union, and urged the men to use militant tactics and to strike (R. 1952–1955; 339–341, 344, 359, 366, 372, 373–381, 387–395).

A substantial number of respondent's employees joined the Union prior to September 10, 1936, and the Union at that time believed it had been designated by a majority of the employees as their representative (R. 1956; 137–188, 291). On September 10 the bargaining committee of the Union called on respondent's superintendent to present a proposed collective bargaining contract and negotiate for its acceptance. Respondent first required, as a condition of the meeting of September 10, that the Union committee be composed only of employees who had worked for respondent for more than 5 years (R. 1948; 205, 252). The Union met this condition, but nevertheless respondent, without questioning whether the Union had been designated by a majority of the employees, and admitting that the terms of employment proposed in the tentative contract were fair and could be met, refused to bargain with the Union committee upon the ground

that it would not deal with any "outside" union (R. 1948–1949; 204–205, 209, 217, 252–253, 282–283, 285, 316).

In accord with respondent's suggestion at the September 10 meeting that the men should consider an "inside" union (R. 1948; 218, 253, 255, 284, 290–291, 316, 433–434, 867), respondent's superintendent and foremen shortly thereafter requested employees to "quit" the Union and circulated a petition for the formation of an "inside" union, which, with admonitions and threats, the employees were urged to sign (R. 1950–1951; 413, 423–426, 430–437, 867, 869, 871–876, 880, 884–893, 896–897, 1350–1352, 1357–1359). The attempt to establish an "inside" union at that time failed, and the campaign was dropped (R. 1951; 1350–1352).

On September 21, when the committee again called upon respondent, an organizer of the Union who was not an employee of respondent was acting as a member. After angrily insisting on the withdrawal of the "outside" organizer, who thereupon withdrew, respondent's superintendent denied that any appointment had been made with the committee, and it left (R. 1949–1950; 230–231, 237, 255–256, 285–286, 317–318).

From November 1936 to February 1937 respondent required the president of the Union to work in a room adjoining the office of the superintendent, and forbade him to go to the plant or associate with other employees (R. 1951–1952; 274, 389, 438–443).

By February 17, 1937, 155 of respondent's 229 production and maintenance employees had joined the Union and designated it as their collective bargaining representative (R. 1955–1957; 188, 1004–1006, 1338–1343, 1636–1659, 1859). On that date, the Union committee met twice with respondent's superintendent. At each meeting the superintendent bluntly rejected the Union's request for collective bargaining upon the ground that respondent would not deal with an "outside" union (R. 1957; 257–258, 270–271, 288–289).

Shortly after the second meeting, which took place early in the afternoon, and because of respondent's refusal to bargain collectively, the Union began a strike which was accompanied by a "sit-down" in two of the key buildings of the plant (R. 1958, 1966; 258, 271–277, 298–300, 328–332, 405–409). Of the employees named in the complaint, 28, mostly women and those working on the night shift, did not participate in the "sit-down" (R. 1958; 81–82, 299–300, 463–465, 469, 660–661, 662, 666–669, 674–677, 697–700, 704–705, 708–709, 720–727, 737–738, 743–744, 748, 762, 772, 779–783, 786, 794–796, 802–803, 806–807, 824, 852–853, 900–903, 1036–1038, 1047, 1056–1057, 1785). A few hours after the strike began, respondent's superintendent went to each of the buildings and demanded that the men leave. Upon their refusal, respondent's attorney shouted that all employees in the buildings were discharged (R. 1958; 1961, 277–278, 302, 333, 1780–1781). On February 18, 1937, re-

spondent secured an injunction from the Circuit Court of Lake County, Illinois, which required the men to vacate the buildings (R. 1958; 1147, 1171–1172, 1781). The workers refused to leave, and on February 19, 1937, successfully resisted an attempt by the sheriff and his deputies to evict and arrest them (R. 1958–1959; 1089–1105, 1113–1123, 1131–1145, 1782, 1833, 1835). Continuously throughout the strike, respondent refused to meet a Union committee or negotiate with it, although requested so to do by the United States Department of Labor, the Governor of Illinois, the Mayor of Waukegan, and others (R. 1959; 1503, 1506–1510, 471–476, 491–503). On February 26 the sheriff and his deputies evicted the workers who then remained in the plant (R. 1959; 585, 949, 1117, 1143, 1174, 1179, 1183).

The strike continued after the ejection of the strikers from the buildings (R. 1960; 335, 721, 748, 902). On March 3 and 5, 1937, written requests were presented to respondent for collective bargaining meetings. Each time, in a written reply, respondent refused the Union's request (R. 1960; 336, 474–476, 508–509, 1668–1673).

Early in March respondent reopened its plant and returned to work all employees who were willing to return, including 37 employees who had participated in the "sit-down" part of the strike and had resisted eviction in violation of the injunction (R. 1959–1961; 1215–1216, 1254–1255, 1299, 1784, 1910). To the employes returning to work respondent paid their regular wages for the time the

plant had been closed (R. 1960; 1136, 1138, 1145, 1152, 1175, 926, 992, 1331–1332). Many of those named in the complaint, including a number of the "sit-down" strikers, were individually solicited to return to work by respondent, but refused respondent's offers because it would not recognize the Union (R. 1960–1962).[2] As a consequence, these as well as the rest of the 92 persons named in the complaint were still out on strike at the time of the hearing (R. 1960; 574, 526, 595, 643, 746, 757, 729, 578, 768, 816, 825, 560, 592, 590, 633).

At the time of the reopening, respondent reorganized its plant by abolishing certain departments and substituting women for men in others (R. 1967–1968). New employees were hired to fill the positions of those remaining on strike (R. 1959).

Shortly after the reopening of the plant a labor organization known as Rare Metal Workers of America was organized among respondent's employees (R. 1962–1963; 917–921, 927). It was instigated and supported by respondent and accorded immediate recognition as the exclusive collective bargaining agent of respondent's employees (R.

[2] The pleadings and evidence show that 22 were so solicited, including 15 "sit-down" strikers (R. 76, 81–82, 446–447, 449, 452–453, 458, 460, 563, 569–574, 579–580, 586–587, 618, 731, 734–735, 907, 1910). The amended answer to the Board's complaint (R. 76, 82) and the undisputed evidence show that 8 of the strikers named in the complaint who had refused respondent's individual solicitation of their return to work thereafter received sentences from the court (R. 334, 449, 562, 563, 569–570, 586, 1241–1242, 1741–1759). Sentences were also imposed on 28 others.

1962–1965; 918–920, 927–945, 962–979, 984, 989, 999–1005, 1008–1011, 1125–1126, 1323).

In June, a substantial number of the sit-down strikers were fined and given substantial jail sentences by the Circuit Court of Lake County for violating the injunction (R. 1959).

Upon the basis of these findings, the Board concluded that respondent, by engaging in espionage upon the Union, by isolating the Union president, by urging employees to abandon the Union, and by other acts, had engaged in unfair labor practices within the meaning of Section 8 (1) of the Act (R. 1951–1955); that respondent had dominated and interfered with the formation and administration of, and had contributed support to, the Rare Metal Workers of America, thereby engaging in unfair labor practices within the meaning of Section 8 (2) of the Act (R. 1962–1965); that on February 17, 1937, and all times thereafter, the Union, having been designated by a majority of respondent's production and maintenance employees as their bargaining agent, constituted the duly designated collective bargaining representative of all employees within an appropriate unit (R. 1955–1957); and that respondent's refusals to bargain with the Union on February 17, March 3, and March 5, 1937, were unfair labor practices within the meaning of Section 8 (5) of the Act (R. 1957–1958, 1962, 1969). The Board further found that the strike on February 17, 1937, was the result of respondent's unfair labor practices occurring on or before that

date, that respondent's announcement of a discharge of those within the plant was not intended to and did not in fact constitute a discharge, and that all the strikers at all times remained employees of respondent (R. 1958, 1960–1961, 1966). Contrary to the finding of the Trial Examiner, the Board concluded that respondent had not engaged in unfair labor practices in violation of Section 8 (3) since the strikers had not actually been discharged and had not applied for reinstatement (R. 1960–1962).

The order of the Board (R. 1970–1971) requires respondent to cease and desist from the unfair labor practices found. As affirmative action which the Board found would effectuate the policies of the Act, respondent is required to bargain collectively with the Union; to withdraw recognition from and disestablish the Rare Metal Workers of America as representative of its employees for collective bargaining; upon their application, to offer immediate and full reinstatement to those employees who went on strike on February 17, 1937, dismissing, if necessary, all persons hired since that date; to make whole all strikers for losses they may suffer by reason of any refusal of their applications for reinstatement in accordance with the order; and to post appropriate notices.

In its decision the Board fully considered respondent's objection that the strikers should not be reinstated because of their participation in the "sit-down" aspect of the strike and related conduct, but

overruled the objection upon the ground that respondent, by defiance of the Act, had caused the strike, and therefore it should not be permitted to assert that the strikers' conduct, engaged in during and as part of the strike, barred their reinstatement (R. 1966–1967). The Board further found that respondent's objection was insincere, in view of the fact that respondent had voluntarily sought out and taken back a large number of the "sit-down" strikers (R. 1967).[3]

On March 24, 1938, respondent, pursuant to Section 10 (f) of the Act, filed in the court below a petition to set aside the Board's order (R. 1–17). The Board answered, requesting full enforcement of its order (R. 18–22). On July 22, 1938, the court, Judge Treanor dissenting, set aside the entire order (R. 1980–2000).

Three opinions were handed down. Both the opinion-in-chief and the dissenting opinion specifically state that the evidence adequately supported the Board's findings that respondent had engaged in espionage and had interfered with and supported Rare Metal Workers of America, thereby committing unfair labor practices within the meaning of Section 8 (1) and (2) of the Act (R. 1987,

[3] The Board took account of the fact that a reorganization of respondent's operations after the strike might make it impossible for respondent to retain all of the reinstated strikers, and accordingly directed that, after the reinstatement necessary to remedy the unfair labor practices, respondent was free to reduce its entire staff as then constituted on any nondiscriminatory basis (R. 1967–1968).

1993–1994). The concurring opinion apparently agrees (R. 1990–1991).

The majority, however, held that the findings that respondent had refused to bargain collectively were not so supported. This conclusion the majority predicated upon their further determination, contrary to the finding of the Board, that the strikers were in fact discharged and for good cause on the evening of February 17, that thereupon they ceased to be employees of respondent, and hence the Union no longer represented a majority (R. 1987). These reasons have no application, of course, to the refusal to bargain on the afternoon of February 17, which is not mentioned.[4] The opinions also reveal a further misconception of the facts and their time sequence. They recite, as grounds for the discharge, many acts of violence, damage to property, and disobedience of the injunction (R. 1987–1988, 1990), although admittedly none of these acts occurred until after the discharge had been announced and could have constituted no basis therefor. The conclusion of the majority was that the whole order, including the provisions based upon the findings of Section 8

[4] The majority did not deal at all with the specific question whether the "discharge" could have any legal effect in view of the provisions of Section 2 (3) protecting the status of the strikers as employees for purposes of the Act. Yet a holding that Section 2 (3) did not apply was a prerequisite to concluding that respondent's refusals to negotiate on March 3 and 5, after the dischharge announcement, were not violations of Section 8 (5).

(1) and (2) violations sustained by the court, should be set aside (R. 2000).

Circuit Judge Treanor, dissenting, held that all of the Board's findings of fact as to the unfair labor practices were supported by the evidence; that even if respondent had intended to discharge the strikers on February 17 they nevertheless thereafter remained employees for purposes of the Act by virtue of Section 2 (3); that the cease and desist provisions of the order were mandatory under the Act as to all unfair labor practices found; and that the affirmative provisions of the order were properly within the power and discretion of the Board and should be enforced in full except as to a minor provision pertaining to the manner of reinstatement in the event there were not sufficient jobs for all employees (R. 1951-2000).

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW PRESENTS A QUESTION SIMILAR TO THAT PRESENTED IN NATIONAL LABOR RELATIONS BOARD v. COLUMBIAN ENAMELING & STAMPING CO., INC., WHICH IS OF VITAL IMPORTANCE IN THE PROPER ADMINISTRATION OF THE ACT

In its decision in the instant case the Circuit Court of Appeals for the Seventh Circuit has again applied, in an even more accentuated form, the doctrine that it originally enunciated in its decision in *National Labor Relations Board* v. *Columbian Enameling & Stamping Co., Inc.*, No. 229, in which certiorari was granted on October 10, 1938.

In the *Columbian* case the court below held that by striking in violation of their contract the employees terminated their employment relationship and thereby ceased to be persons toward whom the employer must observe the duties prescribed by Section 8 (5) of the Act. In the instant case the court has held that employees who struck as a result of unfair labor practices and engaged in violent conduct ceased to be persons with whose representative the employer was required to bargain collectively. Thus, in both cases, the court failed to give effect to the provisions of Section 2 (3) of the Act, which provide that any person who has ceased work as a consequence of and in connection with a current labor dispute or because of unfair labor practices shall remain an employee for the purposes of the Act. The court below read into the section in each case an exception which excludes from the status of employees strikers who have engaged in misconduct. The holding is not only contrary to the express intent of Congress [5] but is also of great importance in the administration of the Act.

The *Columbian* case is not cited by the court below, but there can be no doubt that the doctrine

[5] During the hearings before the Senate Committee on Education and Labor it was urged that the definition of employee should be amended to exclude strikers guilty of violence (Hearings before the Committee on Education and Labor, United States Senate, 74th Congress, 1st Sess., on S. 1958, Pt. 3, pp. 297, 302, 603). The fact that Congress had this suggestion before it and failed to adopt it em-

there enunciated was at the basis of the court's holding. Indeed, Judge Treanor, dissenting, states (R. 1991):

> My disagreement with the reasoning and result of the majority decision rests upon a difference of opinion as to the respective powers of the National Labor Relations Board and this court in the determination of the legal consequences to be attached to the unlawful acts of striking employees. It is, in short, my understanding of the National Labor Relations Act that when employees have ceased work in connection with a labor dispute or because of an unfair labor practice, the employer-employee relationship continues by force of law and that although unlawful conduct by striking employees is a fact which must be considered by the Board in determining the scope of its order, such order cannot be set aside by this court unless the making of the order constitutes an abuse of discretion by the Board in view of all pertinent facts, including the fact of misconduct of the employees.

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phasizes that Congress did not intend such persons to be excluded from the employee category established in the Act. Even more conclusive are the statements in the Senate and House Committee reports on the Act to Congress: that the law was limited to employer conduct and was not intended to deal with employee violence; that existing law both state and federal adequately provided sanctions for employee misconduct; and that it was not desired to burden the Board with the laborious sifting of counter recriminations involved in determining issues relating to employee violence (Sen. Rep. No. 573, 74th Cong., 1st Sess. (1935), pp. 16–17; H. R. No. 1147, 74th Cong., 1st Sess. (1935), pp. 16–17).

Judge Treanor also dissented upon similar grounds in the *Columbian* case.[6]

In the instant case the court below has, however, gone far beyond its decision in the *Columbian* case. Here, although holding specifically that the evidence sufficiently supported the Board's findings of unfair labor practices arising from espionage and the creation of a company union, the court has refused to enforce the corresponding cease and desist and disestablishment portions of the order of the Board. The court holds, in other words, that misconduct by the employees bars the Board from remedying unfair labor practices occuring prior to the strike and which were the direct cause of it, and unfair labor practices committed subsequent to the misconduct but completely unrelated to it. No reason is given in the majority opinions for the refusal to enforce these portions of the order, but the clear inference is that the court was applying

[6] That the effect of unlawful acts of the strikers was actually the basis of the majority decision also appears from the fact that the holding that the discharge was effective is expressly rested by Judge Sparks on the ground that "we are compelled to so hold in order to avoid placing our approval upon such activities as they (the strikers) engaged in." (R. 1988.) Judge Lindley said, "I do not think the law intends that an employer who has discharged acknowledged law violators can be compelled to reinstate them and in case of refusal be said to be, because of such action, a violator himself of the national law. I find nothing leading me to believe Congress so intended" (R. 1990). Further, if the discharge was actually the basis of the decision, the court should have approved the reinstatement of the 28 persons named in the complaint who were never discharged (see p. 9, *supra*, 30, *infra*), which it did not do.

to the present case the doctrine, stated in its decision in the *Columbian* case, that a proceeding for the enforcement of an order of the Board is in effect a private proceeding between employees and the employer in which questions concerning the misconduct of the employees are decisive of the power of the Board.

The decision, we believe, thus presents a question of law even more important than that involved in the *Columbian* case, which has not been but should be settled by this Court. It is a question which recurs in cases arising under the Act. In many of the cases decided by the Board the employer has urged violence or other misconduct as a defense to charges of unfair labor practices.[7] Many of those cases have reached the Circuit Courts of Appeals.[8]

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[7] See, for example, *Matter of Alaska Juneau Gold Mining Co.*, 2 N. L. R. B. 125; *Matter of C. A. Lund Co.*, 6 N. L. R. B., No. 65; *Matter of Biles-Coleman Lumber Co.*, 4 N. L. R. B. 679; *Matter of U. S. Stamping Co.*, 5 N. L. R. B., No. 29; *Matter of Douglas Aircraft Co., Inc.*, 6 N. L. R. B., No. 108; *Matter of Consumers Research, Inc.*, 2 N. L. R. B. 57; *Matter of Rabhor Co., Inc.*, 1 N. L. R. B. 470; *Matter of United Aircraft Mfg Corp.*, 1 N. L. R. B. 236; *Matter of Elkland Leather Co., Inc.*, 8 N. L. R. B., No. 56; *Matter of Electric Boat Company*, 7 N. L. R. B., No. 77; *Matter of Stackpole Carbon Co.*, 6 N. L. R. B., No. 36.

[8] *National Labor Relations Board* v. *The Kentucky Fire Brick Co.* (C. C. A. 6th, decided June 29, 1938); *Standard Lime & Stone Co.* v. *National Labor Relations Board*, 97 F. (2d) 531 (C. C. A. 4th); *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, certiorari denied, No. 970, May 23, 1938; *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138, certiorari denied, No. 907, May 23, 1938.

Moreover, the question is of basic importance in the proper administration of the National Labor Relations Act. If employee misconduct terminates their status as employees under the Act, exempts employers from their duties imposed by the Act to refrain from interfering with, restraining, or coercing their employees and to bargain collectively with their representatives, and prevents the Board from issuing remedial orders to correct unfair labor practices, a large field in which the Board's activities are of the most vital importance are put beyond the powers intended to be conferred upon the Board by Congress.

We submit, therefore, that, not only because the question presented in the instant case is similar to that presented in the *Columbian* case, but also because the decision below presents a serious obstacle to the proper enforcement of the Act, a review of this case is warranted.

II

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH DECISIONS OF THE CIRCUIT COURTS OF APPEALS FOR THE SECOND AND NINTH CIRCUITS

In both *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2d), certiorari denied, No. 970, May 23, 1938, and *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9th), certiorari denied, No. 907, May 23, 1938, the courts considered the effects of acts of violence by employees

upon the power of the Board to remedy unfair labor practices. In the *Remington Rand* case, the Board found that the company had refused to bargain collectively in violation of Section 8 (5) of the Act. The company's contention, that the order of the Board should not be enforced because the union had called a strike in violation of a contract and had been guilty of violence and illegal conduct during the strike, was flatly rejected by the Circuit Court of Appeals. See 94 F. (2d) 872–873. In the *Carlisle* case the court also refused to deny enforcement to an order of the Board on the ground that picketing by employees had resulted in violence and had violated state laws. The decision below is in conflict with each of these decisions.

The decision below also conflicts with the *Carlisle* case in its holding that irrespective of Section 2 (3) of the Act, the purported discharge of the strikers on February 17, 1937, effectively terminated their employee status.

Section 2 (3) of the Act provides in part that, as used therein:

> The term "employee" shall include * * * any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice * * *.

The employees who went on strike in this case satisfy this definition in every detail.

The opinion-in-chief and the concurring opinion do not deal with Section 2 (3), although its relation

to the discharge was fully argued to the court by both parties. Hence, it must be assumed that the court regarded as of no significance the circumstance that the cessation of work was caused by respondent's unfair labor practices. Such a strike, moreover, is clearly a "labor dispute" within the meaning of Section 2 (3), since it is a "controversy concerning * * * the associaton or representation of persons in negotiating * * * or seeking to arrange terms or conditions of employment" (Section 2 (9)).

In the *Carlisle* case, the court, under similar circumstances, sustained the contention of the Board. There the employer, during a strike, and prior to the effective date of the Act, formally notified its employees that they had been discharged and that the payrolls had been closed. Notwithstanding that fact, the court held that the employer had violated Section 8 (5) of the Act in refusing to bargain with the strikers after the Act became effective, and sustained an order of the Board requiring reinstatement of all the strikers. Cf. *Jeffrey-De Witt Insulator Co.* v. *National Labor Relations Board,* 91 F. (2d) 134 (C. C. A. 4th), certiorari denied, 302 U. S. 731; *National Labor Relations Board* v. *Remington Rand, Inc.,* 94 F. (2d) 862 (C. C. A. 2d), certiorari denied, No. 970, May 23, 1938; *Black Diamond S. S. Corp.* v. *National Labor Relations Board,* 94 F. (2d) 875 (C. C. A. 2d), certiorari denied, No. 872, May 23, 1938; *National Labor Relations Board* v. *Biles-*

Coleman Lumber Co., 98 F. (2d) 16, 18 (C. C. A. 9th).

The *Carlisle* decision and that of the court below cannot be distinguished by the fact that the discharge in the instant case was found by the court below to be for good cause. If the justifications for the discharge were the test of the application of Section 2 (3), the fact that the discharges involved in the *Carlisle* case preceded the effective date of the Act, and consequently were for "good cause" no matter what inspired them, effectively answers the attempted distinction.

III

THE COURT BELOW HAS DECIDED SEVERAL IMPORTANT QUESTIONS DIRECTLY CONTRARY TO THE PLAIN LANGUAGE OF THE NATIONAL LABOR RELATIONS ACT

1. As we have already pointed out, *supra*, pp. 19–21, the court below denied enforcement to the portions of the order of the Board requiring respondent to cease and desist from its violations of Section 8 (1) and (2) of the Act and to disestablish the labor organization interfered with and supported in violation of Section 8 (2), in spite of the fact that it held that the findings of the Board that respondent had engaged in espionage and had fostered a company-dominated union were supported by the evidence. Such a holding is not supported by any reasons in the opinion below and is, we submit, contrary to the plain terms of the statute. The

language of the Act is both mandatory and unqualified in directing the Board when it finds that an employer has engaged in or is engaging in unfair labor practices to issue an order requiring the employer to cease and desist therefrom. Section 10 (c). The language of the Act likewise directs the Board to require the employer to take such affirmative action as will remedy the situation brought about by the unfair labor practices, although the Board may exercise its discretion in determining what affirmative action will best effectuate the policies of the Act. The purposes of Congress require that this language be accorded its plain meaning and that an employer who has been guilty of espionage or instrumental in the creation of a company union be subject to a corrective order of the Board. If the policy of the Act is to be effectuated, there can be no reason why espionage or the creation of company-dominated unions should go unremedied.

In addition, the unfair labor practice of respondent in dominating, interfering with, and supporting a labor organization contrary to Section 8 (2) of the Act occurred subsequent to and is a matter entirely apart from the strike. The refusal of the court to enforce the provisions of the order relating to this company dominated union allows respondent now and in the future to treat with a labor organization subservient to its will as the representative of its employees and prevents the employees

from bargaining through their own freely chosen representative. Plainly, under previous decisions of this Court, the order requiring disestablishment should have been sustained. *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272.

2. The court below held that the finding by the Board that respondent had refused to bargain collectively with the Union in violation of Section 8 (5) of the Act was not supported by evidence. The holding is directly contrary to the undisputed evidence. In reaching its conclusion, the court did not question the findings that on February 17, 1937, the Union represented a majority of the production and maintenance employees, that those employees constituted an appropriate unit for collective bargaining purposes, and that twice on February 17, before the strike, respondent refused to treat with the Union committee on the ground that it would not deal with an outside organization (R. 1955–1958). Indeed, respondent's petition for review in the lower court did not question these findings (R. 11). The sole basis for the court's conclusion was that *after* the strike began respondent "discharged" the strikers, so that they were "no longer employes" (R. 1987–1988). Whether or not the "discharge" had any effect upon respondent's obligations thereafter, it certainly cannot have affected its prior refusals to bargain.

The foundation for the court's holding is, therefore, completely erroneous.[9]

3. The court did equal injustice to the facts, we submit, in holding that the evidence did not support the finding of the Board that the discharge was not in fact intended to terminate the employer-employee relationship. Respondent admitted at the hearing that it had never compiled a list of all those whom it claimed to have discharged (R. 1340–1341). Of the striking employees, 22 had been in respondent's employ from 15 to 25 years, 23 of them from 7 to 15 years (R. 651, 906, 628, 201, 412, 462, 467, 708, 736, 634, 747, 731, 540, 631, 643, 636, 648, 685, 751, 642, 184, 598, 555, 662, 792, 665, 448, 460, 614, 655, 756, 753, 619, 513, 527, 531, 611, 603, 486, 544, 946, 471, 596, 600). Many of them were highly skilled in handling rare metals and would be difficult to replace (R. 133–138, 141–145). The improbability that respondent intended perma-

[9] The seriousness of the court's error is apparent from the fact that the finding of refusal to bargain was basic to many parts of the Board's order, including the direction to cease and desist from refusing to bargain collectively, the direction to bargain collectively with the Union, the direction to reinstate upon request all employees who on February 17, 1937, went on strike as a result of the refusal to bargain, and the direction to make whole any employees refused reinstatement after such request. Cf. *Jeffrey-DeWitt Insulator Co.* v. *National Labor Relations Board*, 91 F. (2d) 134 (C. C. A. 4th), certiorari denied, 302 U. S. 731; *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862, certiorari denied, No. 970, May 23, 1938; *Black Diamond S. S. Corp.* v. *National Labor Relations Board*, 94 F. (2d) 875, certiorari denied, No. 907, May 23, 1938.

nently to sever employment relationships of such long standing and value is corroborated by respondent's attempt to persuade 53 of them to return to work (R. 1216, 446–447, 449, 452–453, 458, 460, 563, 569–574, 586–587, 618, 731, 734–735, 907) with offers of a raise in wages plus pay for the time the plant was closed (R. 1138, 1136, 1145, 1152, 1175, 926, 992, 1331–1332), and by respondent's admission at the hearing that it did not exclude anyone from returning to work because of his purported discharge or because of his participation in the "sit-down" (R. 1215–1216, 1254–1255, 1299, 1910, 831). Moreover, the court seriously misinterpreted even those facts which were undisputed. Thus the court regarded the acts of violence and of disregard of the injunction as a cause of the discharges (R. 1987–1988), although it cannot be questioned that they could have constituted no basis therefor since they did not occur until subsequent to February 17.

Under all the circumstances, the Board, we submit, properly concluded that the discharges actually constituted nothing but a familiar tactical maneuver designed merely to counteract the force of the strike by confronting the employees with an apparent loss of their positions, and thus bring about a capitulation upon respondent's terms. The finding is supported by judicial precedent [10] and

[10] Cf. *Jeffrey-DeWitt Insulator Co.* v. *National Labor Relations Board*, 91 F. (2d) 134 (C. C. A. 4th), certiorari denied, 302 U. S. 731; *Densten Hair Co. v. United Leather Workers*, 237 Mass. 199, 129 N. E. 450.

by the Board's own experience.[11] The conclusion by the court below that the finding cannot be supported upon the evidence is plainly erroneous.

4. Under Section 10 (c) of the Act the Board is expressly empowered to require reinstatement of employees, and as shown above, *supra*, pp. 22–24, the strikers here ordered reinstated remained employees for the purposes of the Act since their cessation of work was due to respondent's unfair labor practices and was a labor dispute (Section 2 (3) and (9)). The sole remaining question, therefore, is whether the Board's reinstatement order represented, under the circumstances of this case, an abuse of discretion. The court below did not hold that the order was arbitrary, and we submit that it was not. Concededly, respondent actively importuned many of those who had occupied its premises and resisted eviction to return to work; gave raises, and pay for the period of the strike, to those who accepted its offers of reinstatement; and freely admitted at the hearing that it did not consider anyone as disqualified from employment by reason of his participation in the sit-down or violence (R. 1216). Moreover, the Board could properly give weight to the fact that it was respondent's open violations of the Act which caused the strike and its accompanying disorders. In view of these and

[11] *Matter of Biles Coleman Lumber Co.*, 4 N. L. R. B. 679, 701; *Matter of Stackpole Carbon Co.*, 6 N. L. R. B., No. 36; *Matter of Electric Boat Co.*, 7 N. L. R. B., No. 77; *Matter of American Mfg. Concern*, 7 N. L. R. B., No. 92.

other factors, all of which were carefully considered by the Board in its decision (R. 1960–1962, 1966–1969), its resulting judgment was clearly reasonable and its order correct.

5. In any event, even accepting the court's conclusions as to the discharge, the decision was, on the undisputed facts of this record, plainly erroneous in denying reinstatement to the 28 strikers who, as pointed out in the Statement, *supra,* p. 9, were not in the buildings at the time of the purported discharge, and who were not discharged.[12] As to these 28 employees, the court below denied to the Board a power to order reinstatement which is plainly granted to it by the Act. In cases where unfair labor practices have resulted in strikes, corrective Board orders requiring the employer to offer reinstatement to all employees who went on strike, thereby restoring the *status quo* as it existed before it was disrupted by the unfair labor

[12] The failure of the court to order enforcement of all the affirmative provisions except the reinstatement of those who had been discharged, is by the court's own reasoning, obvious error if the admitted facts are accepted (see footnote 9, *supra*). Even if participation in some feature of the strike rather than the discharge is the test for excluding employees from reinstatement, it affirmatively appears from uncontradicted evidence that at least 12 of the persons named in the complaint did not participate in any of the strike activities, but merely left the plant when the strike began (R. 81–82, 662, 762, 772, 779–783, 786, 802–803, 806–807, 824, 852–853, 1047, 1056–1057). Under such a theory the court should not have set aside even the order of reinstatement, but should have modified it to cover only those who had not participated in violence or the "sit-down."

practices, have been enforced by the courts and accorded express approval as proper remedial measures for such situations. *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2d), certiorari denied, No. 970, May 23, 1938; *Black Diamond S. S. Corp.* v. *National Labor Relations Board*, 94 F. (2d) 875 (C. C. A. 2d), certiorari denied, No. 872, May 23, 1938; *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board*, 91 F. (2d) 134 (C. C. A. 4th), certiorari denied, 302 U. S. 731; *National Labor Relations Board* v. *Oregon Worsted Co.*, 96 F. (2d) 193 (C. C. A. 9th); *National Labor Relations Board* v. *Biles-Coleman Co.*, 98 F. (2d) 16 (C. C. A. 9th).

CONCLUSION

The questions raised by the decision below are of substantial public importance. The decision conflicts with those in other Circuit Courts of Appeals. It is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit should be granted.

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CHARLES FAHY,
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National Labor Relations Board.

OCTOBER 1938.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C. Supp. III, Title 29, Sec. 151 *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include * * * any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute, or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, * * *.

* * * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, * * *.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

* * * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with

or without back pay, as will effectuate the policies of this Act. * * *.

* * * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *.

* * * * *

(f) * * * Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

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